

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 9, 2009

STATE OF TENNESSEE v. LONNIE THOMAS DUKE

**Direct Appeal from the Criminal Court for Davidson County
No. 2007-B-1585 Cheryl Blackburn, Judge**

No. M2008-01103-CCA-R3-CD - Filed December 11, 2009

A Davidson County jury convicted the defendant, Lonnie Thomas Duke, of burglary of a motor vehicle, a Class E felony. The trial court sentenced the defendant as a career offender to six years in the Tennessee Department of Correction. On appeal, the defendant raises the following issues: (1) whether the trial court erred in allowing the state to cross-examine the defendant about his prior convictions and (2) whether the trial court erred in denying his motion for judgment of acquittal. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Nathan Moore, Nashville, Tennessee, for the appellant, Lonnie Thomas Duke.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Background

A Davidson County Grand Jury issued an indictment charging the defendant, Lonnie Thomas Duke, with burglary of a motor vehicle and theft of property worth \$500 or less. A jury convicted the defendant of burglary of a motor vehicle, the theft charge was dismissed, and the trial court sentenced him as a Range III, career offender to six years incarceration.

The following pertinent testimony was presented at the trial. Amanda Powers testified that she was employed with Affiliated Creditors located at the corner of Third Avenue South and Peabody Street. Around 9:30 a.m. on March 1, 2007, she went to her car that she had parked in the

“front parking lot” of the business. Ms. Powers said that on her way back to the building, she “saw something inside of Ms. [Lydia] Roberts’ car” moving around. She was familiar with Ms. Roberts’ car from working with her and stated that it was parked “[i]n the handicap spot right in front of the door.” Ms. Powers approached the vehicle, looked in, and saw the defendant in the passenger’s seat, but she could not see what he was doing. Ms. Powers said that the defendant waved at her; however, she did not recognize him, so she immediately went to notify Ms. Roberts. According to Ms. Powers, no one else was in the car, the parking lot, or the immediate area. Ms. Powers said that after the police arrived, she identified the defendant from the glass foyer of the building.

Lydia Roberts testified that she was working at Affiliated Creditors on March 1, 2007. She said that she was one of the first people to arrive that day, and she parked her Dodge Ramcharger truck in the front of the building because “it was pouring down rain, and it was closest to the door.” She stated that when Ms. Powers came back from her break she “wanted to know if [her] son was doing anything to [her] truck” and advised her that someone was in it. Ms. Roberts said that she went outside and saw a man “walking around the corner of [her] truck getting ready to go back down to the street.” She noticed the man had her prescription sunglass case, and she asked him where he was going. She also asked him to return her belongings, and he complied. After he returned her things, she placed them back in her truck. She recalled that he returned her “tool bag, a Craftsman canvas bag that [she] had a spotlight in that you could hook up to a cigarette lighter[,] . . . some CDs, . . . ink pens, fingernail clippers[,] . . . [and] a pocket knife.” She said that “[h]e had basically gone through everything [she] had in the truck, console, [and] glove box.” According to Ms. Roberts, her belongings were “strewn everywhere.” Ms. Roberts called the police, and they brought the defendant back to Affiliated Creditors where she identified him. Ms. Roberts testified that she had not given anyone permission to be in her vehicle that morning. She stated that she “[e]vidently” did not lock her driver’s side door “[b]ecause it was raining and when [she] dashed for the door, [she] forgot to lock it.” Ms. Roberts further stated that she locked the passenger and hatch doors.

On cross-examination, Ms. Roberts testified that when she asked for her belongings back, the defendant’s demeanor was friendly, and he did not appear to be alarmed or anxious. After he returned her things, he walked away and did not threaten her.

Officer Steven Haines, of the Metropolitan Nashville Police Department, testified that on March 1, 2007, he answered a call for service that led him to Affiliated Creditors. According to Officer Haines, the police department “put out a pick-up” and gave a description of the suspect. When he arrived at Affiliated Creditors, he spoke with Ms. Powers and Ms. Roberts. Shortly after that, another officer arrived with the defendant in custody. When the officers presented the defendant to Ms. Powers and Ms. Roberts, they both identified him as the person they had seen earlier.

At the close of the state’s proof, the defendant made a motion for judgment of acquittal. After the trial court denied the defendant’s motion for judgment of acquittal, the defendant testified in his defense.

The defendant stated that on March 1, 2007, he was working for his brother junking cars. He explained that junking is where they “ask people . . . if they want whatever is in the vehicle . . . [and] they say, well, you can have this or you can have that.” He said that on that day he was walking down Peabody Street, and he encountered a parking lot. The defendant stated that there was a truck in the parking lot that “didn’t look like . . . somebody was driving it.” According to the defendant, there was “some old guy laying in the front seat with the window rolled down[.]” The defendant said that the man asked him for a cigarette, and he gave him one. The defendant testified that the man said he was going to trash the truck, and the defendant could have whatever he wanted from it. The man then asked him for money to purchase a beer, and the defendant gave him the money. The defendant said the man walked away and left “his bed clothes and everything laying in the front seat[.]” The defendant testified that he believed the man was the owner of the vehicle and “thought he was just sleeping in it[.]”

The defendant then rummaged through the vehicle. He stated that he “wasn’t looking . . . to steal nothing [sic]” and was “looking to get whatever was in the truck that [he] thought was worth something.” The defendant said when he got out of the truck, two women and a man were standing in front of it. The defendant said that when he encountered Ms. Roberts “it made [him] nervous because [he] didn’t know what was going on[.]” He testified that he did not think he was doing anything wrong. The defendant stated that he “walked right up to them and [he] told them . . . [that he] wasn’t trying to steal nothing [sic] . . . [and] the only thing [he] was doing was getting whatever dude told [him] [he] could have.” He then gave the things back, apologized for the misunderstanding, and asked if everything was okay. The defendant said that he left and walked down Broadway toward Third Avenue. The defendant stated that he “wasn’t trying to run. [He] didn’t run from the lady.” While the defendant walked down Broadway, a police officer pulled behind him and told him to put his hands behind his back. The officer asked if the defendant had taken some things out of a truck up the street, and he replied yes. He stated that he advised the officer that “the guy said [he] could have . . . whatever was in there . . . [and] that they was [sic] going to junk the truck.” The defendant said that the officer put handcuffs on him and took him back to the scene for identification.

On cross-examination, the defendant testified that before he came upon the parking lot, he was going “down on Broadway” to try to make money with his other brother by shining shoes. The defendant said that he was walking on Third Avenue, and the truck was on his left. According to the defendant, the truck was on the side of the parking lot close to the road, and “[y]ou could walk on the side of the sidewalk and touch the truck.” He testified that a man was leaning back in the truck and did not appear to be doing anything. The defendant stated that he had never seen the man before; however, he took the man at his word when he said he was junking the truck. The defendant further stated that the man had no reason to set him up to be arrested. The defendant said that the man left the vehicle from the passenger’s side and did not take anything from the vehicle with him.

The defendant stated that he entered the vehicle from the driver’s side and “was just looking . . . to see what was in there[.]” The defendant said he saw “a couple of CDs that was [sic] just laying there. [He] crawled over the seats, . . . going though the floorboards and everything, . . .

looking for whatever [he] could find.” He did not remember going through the glove box but stated that he went through the console and found a pair of prescription sunglasses. The defendant said that he thought somebody left the sunglasses, but he did not think that they belonged to the man with whom he had spoken. The defendant stated that the tool kit with the spotlight in it was in the back of the truck, and he crawled over the seats to get back there. The defendant was in the vehicle for about twenty minutes. The defendant acknowledged that a jury convicted him of attempted burglary and theft of more than \$1,000 on April 24, 1997. He also acknowledged that on May 27, 2004, a jury convicted him of aggravated burglary.

On redirect examination, the defendant testified that if he had been burglarizing the vehicle, he would have stayed in it for “two or three minutes at the most” and would have run away. He said that “if [he] had been trying to steal when [he] got out of that truck with that stuff in [his] hand, [he] wouldn’t have handed the lady her stuff and apologized.”

Ms. Roberts testified on rebuttal examination that she would not have left her windows down that day because it was raining. She also stated that when she got her belongings from the defendant, none of her truck windows were open.

Based on the evidence presented, the jury found the defendant guilty of burglary of a motor vehicle, and the trial court sentenced him to six years in the Tennessee Department of Correction. The defendant has appealed.

Analysis

Use of Prior Convictions to Impeach the Defendant’s Testimony

The defendant asserts that the trial court erred in allowing the state to impeach the defendant with prior convictions for burglary and theft. Specifically, the defendant argues that the repeated mention of the crimes “greatly and unfairly prejudiced” the defendant and “certainly outweigh[ed] any potential probative value.” The state argues that because the witnesses offered differing testimony concerning the burglary, the defendant’s credibility was at issue. Therefore, the state contends that the probative value of the convictions outweighed any unfair prejudice.

This court reviews a trial court’s ruling on the admissibility of prior convictions for impeachment purposes under an abuse of discretion standard. *See State v. Waller*, 118 S.W.3d 368, 371 (Tenn. 2003). A trial court’s evidentiary ruling under Rule 609 of the Tennessee Rules of Evidence will not be overturned absent an abuse of discretion. *State v. Mixon*, 983 S.W.2d 661, 675 (Tenn. 1999).

Rule 609 of the Tennessee Rules of Evidence permits counsel to impeach the accused’s credibility by prior criminal convictions on cross-examination if certain conditions and procedures are satisfied. The conviction must be for a crime (1) punishable by death or incarceration in excess of one year, or (2) involving dishonesty or false statement. Tenn. R. Evid. 609(a)(2). Generally,

counsel cannot use convictions that are ten-years-old or more for the purpose of impeachment. Tenn. R. Evid. 609(b). The state is required to give reasonable written notice prior to trial of the particular convictions it intends to use to impeach the accused. Tenn. R. Evid. 609(a)(3). Before permitting the use of a prior conviction, the trial court must find that the probative value of the conviction on the issue of credibility outweighs its unfair prejudicial effect on the substantive issues. *Id.* The trial court shall rule on the admissibility of the prior conviction before the accused testifies. *Id.*

“The mere fact a prior conviction of the accused is identical or similar in nature to the offense for which the accused is being tried does not, as a matter of law, bar the use of the conviction to impeach the accused as a witness.” *State v. Baker*, 956 S.W.2d 8, 15 (Tenn. Crim. App. 1997) (citations omitted). However, “[w]hen an impeaching conviction is substantially similar to the crime for which the defendant is being tried, there is a danger that jurors will erroneously utilize the impeaching conviction as propensity evidence of guilt and conclude that since the defendant committed a similar offense, he or she is probably guilty of the offense charged.” *State v. Mixon*, 983 S.W.2d 661, 674 (Tenn. 1999) (citations omitted). Accordingly, trial courts should engage in a two-prong analysis when determining if the probative value of the impeaching conviction is outweighed by its prejudicial effect. *Id.* Trial courts are required to expressly (1) “analyze the relevance the impeaching conviction has to the issue of credibility,” as well as (2) “assess the similarity between the crime on trial and the crime underlying the impeaching conviction.” *Id.* (citations omitted).

Before the jury trial, the state notified the defendant of its intent to use eleven prior convictions including one prior theft conviction, six burglary convictions, and four convictions for attempt to commit burglary. The defendant filed a motion in limine to prohibit any mention of the defendant’s prior convictions. The court allowed the state to cross-examine the defendant on his theft conviction and reserved ruling on the other convictions until the defendant’s credibility became an issue. During the defendant’s testimony, the trial court determined that the defendant’s credibility was “absolutely crucial” in this case. The court stated that the defendant’s credibility was at issue because he testified that there was “a man sitting in the car other than him, that he [gave] him permission and he walks away. . . . Ms. Powers said she [did not] see anybody when she [came] out. She only [saw] this one person. . . . [H]is story . . . is incredible in and of itself, so his credibility is crucial.” The court allowed the state to cross-examine the defendant regarding his 1997 conviction for attempted burglary, his 2004 conviction for aggravated burglary, and his 1997 theft conviction.

We conclude that the trial court did not abuse its discretion in admitting the convictions for attempted burglary, theft, and aggravated burglary. The trial court determined that the defendant’s prior convictions were probative of the defendant’s credibility. The convictions that the court allowed the state to use to impeach the defendant involve dishonesty and are highly probative of credibility. *See State v. Blevins*, 968 S.W.2d 888, 893 (Tenn. Crim. App. 1997) (concluding that the trial court did not abuse its discretion in allowing the defendant to be impeached with burglary, robbery, and larceny convictions when the defendant was on trial for burglary of a motor vehicle). In addition, the trial court attempted to limit the prejudicial effect of the convictions by instructing the jury that they were only to consider the convictions for its effect, if any, on the defendant’s

credibility as a witness. The trial court did not abuse its discretion in admitting the defendant's prior convictions.

Motion for Judgment of Acquittal

The defendant asserts that the trial court erred in denying his motion for judgment of acquittal because there was insufficient direct evidence to convict him. The defendant argues that the state only proffered circumstantial evidence to support the conviction and there was no direct evidence that the defendant possessed the *mens rea* to commit the offense. The state responds, under the authority of *Finch v. State*, 226 S.W.3d 307, 313 (Tenn. 2007), that the defendant presented proof in his defense at trial and thereby waived his motion for acquittal at the conclusion of the state's proof. "[A] defendant waives his or her right to appeal from a trial court's refusal to grant a motion for judgment of acquittal if the defendant continues to participate in the trial after the close of the [s]tate's proof." *Finch*, 226 S.W.3d at 316 (citing *Mathis v. State*, 590 S.W.2d 449, 453 (Tenn. 1979)). To preserve the record for appellate review at the point he made the motion, "the defendant must stand upon his motion, and rest his case without offering proof." *State v. Thompson* 549 S.W.2d 943, 945 (Tenn. 1977). If the defendant offers evidence and does not stand upon his motion, then the defendant must renew the motion at the end of all of the proof to have the issue considered on appeal. *See State v. Thompson*, 549 S.W.2d 943, 945 (Tenn. 1977) If the defendant renews the motion, the trial and appellate courts will determine whether the motion should be granted based on a review of the entire record. *See id.*

At the close of the state's proof, the defendant made a motion for judgment of acquittal, which the trial court denied. After the trial court's denial, the defendant continued to participate in the trial by calling witnesses and testifying. The defendant did not stand on his motion for judgment of acquittal nor did he renew his motion at the close of all the proof. Therefore, we conclude that the defendant has waived his motion for judgment of acquittal.

Conclusion

Based on the foregoing, we affirm the judgment of the trial court.

J.C. McLIN, JUDGE